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NO. 93-1485

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE UNITED STATES,

Petitioner,

v.

CHARLES P. COCKE, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT CHARLES P. COCKE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether federal law may be applied retroactively to revive state law claims against officials of failed federally insured financial institution that were time-barred under applicable state statutes of limitation before they were assigned to the Federal Deposit Insurance Corporation as receiver of the institution.

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BRIEF OF RESPONDENT CHARLES P. COCKE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Charles P. Cocke ("Cocke") respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari ("FDIC Petition") filed by Petitioner, Federal Deposit Insurance Corporation ("FDIC"), in this case. For the reasons set forth herein, Cocke requests that the FDIC Petition be denied. Cocke further urges this Court to grant the companion Petition for Writ of Certiorari filed by Petitioners John E. Harrison and Light & Harrison, P.C. ("Harrison Petition") in this case.

COUNTERSTATEMENT OF THE CASE

Cocke relies upon and incorporates by reference the Counterstatement of the Case presented in the Brief of Respondents John E. Harrison and Light & Harrison, P.C. in Opposition to Petition for Writ of Certiorari ("Harrison Brief in Opposition") filed in this case. In addition, Cocke relies upon and incorporates by reference the Statement of the Case presented in the Harrison Petition filed with this Court. The Statements of the Case in the Harrison Brief in Opposition, in the Harrison Petition and in the FDIC Petition focus primarily upon the complex maze of facts and legal proceedings surrounding the primary litigation between FDIC and the former officers, directors and attorneys of McLean Savings and Loan Association ("McLean Savings") and McLean Financial Corporation ("McLean Financial") who were originally named in the Complaint ("Leonard Complaint") filed by FDIC on November 29, 1991 in the U.S. District Court for the Eastern District of Virginia, Alexandria Division. However, Cocke was not a party to this original lawsuit and was not named at that time as a principal participant in any of the alleged activities described in the Leonard Complaint. Several key aspects of his situation require focus and comment.

FDIC filed a separate Complaint against Cocke ("Cocke Complaint") on March 9, 1992. Cocke filed a Motion to Dismiss on April 17, 1992. On May 1, 1992, Judge Albert V. Bryan, Jr. granted a series of Motions for Summary Judgment filed by several of the principal Defendants named in the Leonard Complaint. FDIC's counsel recognized that these rulings made by the District Court in the Leonard case would govern the Court's consideration of the Motion to Dismiss filed by Cocke. While preserving his objections to these rulings, FDIC's counsel consented to and executed a Final Order granting Cocke's Motion to Dismiss. The Final Order entered by the District Court on August 12, 1993 incorporated key factual and legal acknowledgements by both FDIC and Cocke. *See* FDIC Petition, 20a-22a. Cocke was an officer and director of McLean Savings from 1977 through

January, 1988. He was a director of McLean Financial from 1982 through September, 1987. The claims alleged by FDIC against Cocke "arose no later than April, 1987". Both parties expressly acknowledged that under the provisions of §8.01-248 of the Code of Virginia, 1950, as amended, the Virginia statute of limitations for the claims alleged against Cocke "expired no later than April, 1988". It was not until July 8, 1988 that the Federal Home Loan Bank Board ("FHLBB") appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver of McLean Savings. By virtue of certain tolling agreements executed by the parties, FDIC and Cocke agreed that the Cocke Complaint was "deemed filed" on June 5, 1991. Accordingly, FDIC admitted that its claims against this Respondent were not filed until after the statute of limitations in §8.01-248 had expired. On this basis, the Motion to Dismiss was granted and the Cocke Complaint was dismissed with prejudice.

More importantly, the Cocke Complaint contained no allegations that Cocke had perpetrated any fraud or engaged in any concealment of the facts which gave rise to the claims made by FDIC against him. In response to the Motion to Dismiss, FDIC came forward with no evidence that Cocke had engaged in any activity that concealed or attempted to conceal these alleged causes of action. In the Final Order entered by the District Court, FDIC made no attempt to preserve any argument that the applicable statute of limitations had been tolled by any conduct by Cocke. In short, there is no evidence in the record of this case that would permit the District Court, the Fourth Circuit Court of Appeals or this Court to conclude, suspect or infer that the applicable state statute of limitations invoked by Cocke should have been tolled under principles of equitable estoppel.

SUMMARY OF ARGUMENT

This Court's recent opinion in *O'Melveny & Myers v. FDIC* and its denial of the FDIC's Petition for Writ of Certiorari in *FDIC v. Dawson* should leave little doubt that the FDIC Petition in this case should be denied. The one (1) year Virginia statute of limitations on these state law claims against Cocke had expired prior to the federal takeover of McLean Savings on July 8, 1988. The appointment of FDIC as receiver for the institution did not revive these time-barred claims. There is no federal common law doctrine of adverse domination that would suspend the running of applicable state statutes of limitations on such causes of action.

However, the Fourth Circuit Court of Appeals erred in its decision to remand these consolidated cases to the District Court for a determination of whether the statute of limitations was tolled under the doctrine of equitable estoppel. There was no evidence in the record that would permit any such finding that Cocke or any of the other former officials of McLean Savings and McLean Financial had engaged in any effort to conceal any of the facts which gave rise to the FDIC's allegations of breach of duty, negligence, gross negligence and breach of contract in this case. The District Court's findings on these issues should have been affirmed in all respects and the claims filed by FDIC against Cocke should have been dismissed without remand of any kind.

ARGUMENT

I. THE DISTRICT COURT AND THE FOURTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT FDIC'S CLAIMS WERE BARRED UNDER THE APPLICABLE VIRGINIA STATUTE OF LIMITATIONS.

The primary issue decided by the District Court and the Fourth Circuit Court of Appeals in this case was whether the claims asserted by FDIC against the former officials of McLean Savings

and McLean Financial were time-barred under the applicable Virginia statute of limitations. All parties acknowledged that these were state law claims.[1] All parties acknowledged that the claims arose no later than April, 1987.[2] All parties acknowledged that the federal takeover of McLean Savings did not occur until July, 1988.[3] All parties acknowledged that pursuant to the various tolling agreements entered into with FDIC, the complaints against the various Respondents were deemed filed on June 5, 1991. To the extent that any such claims remained viable on June 5, 1988, they were properly preserved for FDIC under the three (3) year statute of limitations provided by the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").[4] However, if the statute of limitations on these claims already had expired by that point in time, FDIC would be stepping into empty shoes.

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[1] The Cocke Complaint broadly describes various transactions from 1984 through 1988 involving McLean Savings and McLean Financial in which Cocke allegedly breached fiduciary duties (Count I), committed negligence (Count II), committed gross negligence (Count III) and breached an express or implied contract (Count IV). These allegedly culpable actions related generally to certain loans between McLean Savings and McLean Financial, certain excess yield payments by McLean Savings to McLean Financial, a dividend declared by McLean Savings, the release of collateral by McLean Savings on the Spann-Bellinger Properties and the payment of excess compensation to certain officers of McLean Financial.

[2] The "last act or omission challenged by the FDIC occurred in April of 1987". *See* FDIC Petition, 3.

[3] *See* FDIC Petition, 2.

[4] Under 12 U.S.C. §1821(d)(14), the statute of limitations for tort claims brought by FDIC as receiver is three (3) years from the later of (a) the date that FDIC was appointed as receiver, or (b) the date on which the cause of action accrued.

Both the District Court and the Court of Appeals found that these state law claims were governed by the one (1) year statute of limitations found in §8.01-248 of the Code of Virginia, 1950, as amended.[5] In its Petition filed with this Court, FDIC does not specifically address the issue of whether this one (1) year statute of limitations controls such state law claims. Rather, FDIC argues that federal law governs the question of whether the adverse domination doctrine operates to toll the state statute of limitations on a claim acquired by a federal agency as receiver of a failed financial institution. *See* FDIC Petition, 5. FDIC claims that the Fourth Circuit should have followed the guidance of *Farmers & Merchants National Bank v. Bryan*, 902 F.2d 1520, 1522 (10th Cir. 1990) which permitted the "borrowing" of a state statute of limitations while applying federal tolling principles.[6]

Cocke adopts and incorporates by reference the arguments and authorities presented in the Harrison Brief in Opposition on these issues. *See* Harrison Brief in Opposition, 4-13. As Harrison thoroughly and eloquently explains, federal courts have consistently held that where a state statute of limitations has expired before FDIC has acquired a claim, the cause of action is not revived by its mere transfer to the federal agency. *See*

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[5] The District Court relied on two (2) recent Virginia decisions which focused on the proper distinction between injuries to persons and injuries to property under applicable statutes of limitation. *See C-T of Virginia, Inc. v. Barrett*, 124 B.R. 694 (W.D. Va. 1990), *aff'd*, 958 F.2d 606 (1992); *Pigott v. Moran*, 231 Va. 76, 341 S.E.2d 179 (1986). FDIC utterly failed to distinguish these pivotal Virginia cases in the District Court proceedings. On appeal, the Fourth Circuit specifically declined to follow FDIC's suggestion that a five (5) year statute of limitations for damage to property should govern these claims. *FDIC v. Cocke*, 7 F.3d 396, 401-02 (4th Cir. 1993).

[6] *Bryan* dealt with alleged violations of lending limits imposed on national banks pursuant to federal statute (12 U.S.C. §84) for which a cause of action is specifically provided under federal law.

Guaranty Trust Co. v. United States, 304 U.S. 126, 142, 58 S.Ct. 785, 82 L.Ed. 1224 (1938). The 10th Circuit's holding in *Bryan* must be properly limited to cases involving federal causes of action, not state law claims. *See FDIC v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993). The federal receiver cannot invoke federal adverse domination principles to toll state law statutes of limitation.

More importantly, FDIC suggested that its Petition in this case should be "held" in order to permit the ultimate disposition of two (2) other cases which were pending before the Court at that time. *See* FDIC Petition, 7. The case of *O'Melveny & Myers v. FDIC* was scheduled for argument before the Court on March 21, 1994. On that same day, FDIC filed its Petition for Writ of Certiorari in *FDIC v. Dawson*. FDIC felt that this Court's handling of these two (2) appeals would provide appropriate guidance on the issues raised in its Petition in *Cocke*.[7] The final sentence of FDIC's Petition presents what could become a self-fulfilling prophecy for the government in this appeal: "The cases then should be disposed of as applicable in light of the Court's disposition of those two cases." *See* FDIC Petition, 7.

On June 13, 1994, this Court issued its decision in *O'Melveny*. Justice Scalia's opinion leaves little doubt about the viability of FDIC's argument that federal law should govern the handling of such state law claims. The unanimous Court rejected FDIC's claim that federal law should control the state law issue of whether knowledge of corporate officials of fraudulent conduct could be imputed to the savings and loan itself:

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[7] FDIC contended that *O'Melveny* "may shed light on the proper analysis to be used in deciding *Dawson* and these cases." FDIC also suggested that *Dawson* "would constitute a better vehicle than these cases for such plenary review." *See* FDIC Petition, 6.

> "The first of these contentions need not detain us long, as it is so plainly wrong. 'There is no federal general common law,' *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938), and (to anticipate somewhat a point we will elaborate more fully in connection with respondent's second contention) the remote possibility that corporations may go into federal receivership is no conceivable basis for adopting a special federal common-law rule divesting States of authority over the entire law of imputation." ___ U.S. ___, 114 S.Ct. 2048, 2053, ___ L.Ed. ___ (1994).

The Court also rejected FDIC's reliance on *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). Just like the Fourth Circuit in *Cocke* and the Fifth Circuit in *Dawson*, the *O'Melveny* Court properly recognized that state law rules must govern state law claims. 114 S.Ct. at 2053.[8]

Justice Scalia also addressed the government's contention that the entire statutory scheme of FIRREA should preempt state law rules in cases brought by FDIC. The Court recognized that an explicit federal statutory provision might displace applicable state law. However, after reviewing the statutory scheme of this particular legislation, the Court found no justification for such displacement of state law in this case:

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[8] In *Cocke*, the Fourth Circuit held that FDIC's state law claims "must be governed by the Virginia courts' and legislature's interpretations of that action." 7 F.3d at 400. Likewise, in *Dawson*, the Fifth Circuit observed that "when state statutes of limitation are borrowed, state tolling principles are to be the 'primary guide' of the federal court." 4 F.3d at 1309 *citing Johnson v. Railway Express Agency*, 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295 (1975).

> "It is hard to avoid the conclusion that §1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional 'federal common-law' exceptions is not to 'supplement' this scheme, but to alter it." 114 S.Ct. at 2054.

While *O'Melveny* dealt primarily with state law imputation principles, there is no logical reason for distinguishing state law tolling principles regarding statutes of limitations. Absent some specific federal statutory provision, applicable state law must govern.[9]

This Court's decision in *O'Melveny* decimates FDIC's position in *Cocke*. Any lingering doubt about the viability of the government's argument on federal preemption of state law tolling principles was answered on the very same day that the *O'Melveny* decision was announced. On June 13, 1994, this Court also denied FDIC's Petition for Writ of Certiorari in *Dawson*. The Fifth Circuit's opinion had dealt with the precise questions raised in the

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[9] In *Dawson*, the Fifth Circuit dealt more directly with this issue within the context of such statute of limitations tolling principles:

> "That is, because the FDIC is merely acquiring the claims held by the failed bank, the issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver. Only if the bank's claims are still viable under state law on that date does the limitations clock start to run anew under FIRREA's limitations provision. Because this step of the analysis is purely a question of state law, there is no justification for applying federal equitable tolling principles to pre-receivership events." 4 F.3d at 1309.

FDIC Petition in *Cocke*. The Fifth Circuit held that state law statutes of limitation governed state law claims. The Fifth Circuit held that state law tolling provisions were controlling. The Fifth Circuit held that federal adverse domination principles did not apply. The Fifth Circuit expressly declined to follow *Bryan* or *Kimbell*, two (2) cases which provide the shaky foundation for FDIC's entire position in this appeal. 4 F.3d at 1308-10.

In the wake of this Court's ultimate disposition of *O'Melveny* and *Dawson*, there appears to be little basis for granting the FDIC Petition in *Cocke*. The one (1) year Virginia statute of limitations should govern FDIC's claims against the former officials of McLean Savings and McLean Financial. Federal adverse domination principles are inapplicable. State law tolling provisions must govern. The rulings made by the District Court and the Fourth Circuit on these issues should be affirmed and the FDIC Petition should be denied. However, this still leaves one troubling, unanswered question for the Court's consideration: Is there any reason to remand these cases to the District Court for a determination of whether the statute of limitations was tolled under state law principles of equitable estoppel?

II. THE FOURTH CIRCUIT COURT OF APPEALS ERRED IN REMANDING THIS CASE TO THE DISTRICT COURT FOR A DETERMINATION OF WHETHER THE STATE STATUTE OF LIMITATIONS WAS TOLLED UNDER THE DOCTRINE OF EQUITABLE ESTOPPEL.

After finding that FDIC's claims against Respondents were governed by the one (1) year statute of limitations in §8.01-248 of the Code of Virginia, 1950, as amended, the Fourth Circuit then considered the question of whether the running of the statute was tolled under state law equitable estoppel principles. While noting that Virginia courts have not adopted the doctrine of adverse domination, the Court of Appeals recognized that certain

intentional, fraudulent conduct by Respondents might toll the statute:

> "Based on these provisions of Virginia statutory and case law, we hold that a statute of limitations is tolled until a person intentionally misled by a putative defendant could reasonably discover the wrongdoing and bring action to redress it. Therefore, we conclude that the district court erred by rejecting outright the application of a tolling mechanism to the facts of this case. Under Virginia's doctrine of equitable estoppel, however, the FDIC will have to do more than show that all of McLean directors were implicated in the wrongdoing, and that it was unable to sue until it became the corporation's receiver. The FDIC also will have to show that the directors concealed their wrongdoing from McLean, MFC, and their shareholders, the parties from whom the FDIC derived its interest in this lawsuit, during the period after the last act of alleged misconduct until the FDIC became receiver." 7 F.3d at 402-03.

The Court of Appeals then remanded the case back to the District Court for a proper determination of this equitable estoppel question.

Harrison dealt with this issue in considerable detail in his separate Petition for Writ of Certiorari to this Court. Cocke adopts and incorporates by reference all of the arguments and authorities cited by his fellow Respondent. *See* Harrison Petition, 8-16. The tolling issue was properly presented to the District Court in the argument on Respondents' Motion for Summary Judgment on May 1, 1992. In their Motion and supporting materials, Respondents had vigorously contested any suggestion that any of their allegedly culpable acts had been intentionally

concealed. FDIC attempted to file various opposition papers with the District Court in response to the statute of limitations question raised by Respondents. Since these pleadings were not timely filed by FDIC, they were stricken by the District Court. FDIC never appealed this specific ruling by Judge Bryan. However, on appeal to the Fourth Circuit, FDIC relied extensively on these stricken pleadings in an attempt to support its federal adverse domination argument regarding the tolling of the statute of limitations.

FDIC clearly had the burden of proof on any such tolling issues. FDIC clearly had the burden of coming forward with some evidence that would support a finding of intentional concealment. FDIC clearly failed to meet even minimal standards of persuasion on this issue. Instead, the record presented to the District Court conclusively showed that there was no basis for any finding that Respondents had concealed any alleged wrongdoing. As Harrison's Petition highlights, the transactions which serve as the primary basis for FDIC's claims against Respondents were disclosed to the Federal Home Loan Bank Board examiners, disclosed to independent shareholders, disclosed in the public financial statements of McLean Savings and disclosed to at least one former officer and shareholder of McLean Savings who was not charged with any wrongdoing by the government. In response to these facts presented by Respondents in their Motion for Summary Judgment, FDIC came forward with no evidence of concealment by the former officers and directors of the institution. *See* Harrison Petition, 9.[10]

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[10] Even the stricken pleadings filed by FDIC failed to produce any such facts or evidence that would support a finding of concealment. At most, FDIC's opposition papers sought to establish a form of non-intentional equitable estoppel by virtue of assurances given by McLean Savings to the FHLBB that the institution was sufficiently sound to preclude the imposition of formal regulatory restrictions. *See* Harrison Petition, 11.

Cocke's unique position in this litigation provides even less justification for a remand to the District Court on the claims made against him. The Cocke Complaint contained no allegations that Cocke had perpetrated any fraud or engaged in any concealment of the facts which gave rise to the claims of breach of duty, negligence, gross negligence and breach of contract made by FDIC against him. In response to the Motion to Dismiss, FDIC came forward with no evidence that Cocke had engaged in any activity that concealed or attempted to conceal these alleged causes of action. In the Final Order entered by the District Court, FDIC made no attempt to preserve any argument that the applicable statute of limitations had been tolled by any conduct by Cocke. In short, there is no evidence in the record of this case that would permit the District Court, the Fourth Circuit Court of Appeals or this Court to conclude, suspect or infer that the applicable state statute of limitations invoked by Cocke should have been tolled under principles of equitable estoppel.[11]

The record in this case strongly suggests that the government's untimely filing of these claims was not caused by any adverse domination or fraudulent concealment by Respondents, but by its own inartful, sometimes comedic, handling of this entire matter.[12] The Federal Home Loan Bank Board had actual knowledge of many of these allegedly culpable transactions in 1986 and 1987 within the context of its regulatory review of McLean Savings. McLean Financial declared bankruptcy in September, 1987. The

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[11] *Dawson* also suggests that no finding of adverse domination can be based solely upon allegations of negligent conduct by the directors of a failed institution: "The facts of the instant case demonstrate that the adverse domination theory is inappropriate when the majority of the board is merely negligent." 4 F.3d at 1312. In the Complaint filed against Cocke, FDIC asserts no intentional misconduct or fraud. The government's state law claims are based solely upon accusations of breach of duty, negligence, gross negligence and breach of contract.

[12] *See* Harrison Petition, 4-7.

Bank Board waited until July, 1988 to take any formal action to seize control of McLean Savings. FDIC and its inexhaustible army of lawyers, accountants, regulators and investigators poured through the records, documents and files of McLean Savings and McLean Financial for almost three and one-half (3-1/2) years before they filed their original Complaint against Leonard and the other original Respondents in November, 1991. FDIC waited another three (3) months before filing its Complaint against Cocke. FDIC's handling of the litigation itself was characterized by inadequate pleadings, late filings, inexcusable errors and ultimate failures. After consuming over six (6) years, millions of taxpayer dollars and all the patience the U.S. District Court had to offer, FDIC's relentless pursuit of this litigation has little or nothing to show for itself except a last-ditch, desperate appeal to this Court. Unsubstantiated government assertions of adverse domination and fraudulent concealment by Respondents have no legitimate place in this case. FDIC itself must bear the sole responsibility for its failure to act in a timely manner in the filing of these claims.

Under these circumstances, Cocke urges this Court to follow a somewhat unique path toward the final resolution of these claims. The FDIC Petition should be denied. The Harrison Petition should be granted. The portion of the Fourth Circuit's opinion which mandates a remand of this case to the District Court for findings on equitable estoppel should be reversed in all respects. FDIC already had its opportunity to present such evidence to the District Court. It failed to carry its burden of proof on this issue. No second bite at the apple is warranted. It is time to bring this phase of the McLean Savings witch hunt to a merciful end. At the very least, it is time to remove this cloud from over the head of Charles P. Cocke.

CONCLUSION

For all of the foregoing reasons, Respondent, Charles P. Cocke, respectfully prays that the Petition for a Writ of Certiorari filed by Petitioner, Federal Deposit Insurance Corporation, should be denied.

Respectfully submitted,

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